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Supreme Court of the United States

OCTOBER TERM, 1942

PEOPLE OF THE STATE OF ILLINOIS, EX REL. BLANCHE DAVIDSON, CARL C. CRAMER AND FRANK W. PHILLIPS, PETITIONERS,

vs.

PRESTON BRADLEY, JOHN DILL, OTTO G. BEICH, ET AL., RESPONDENTS.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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ARGUMENT.

I.

THE CONSTITUTIONAL QUESTION WHICH THE PETITIONERS NOW SEEK TO PRESENT TO THIS COURT WAS NOT PROPERLY RAISED OR ASSERTED EITHER IN THE TRIAL COURT OR IN THE SUPREME COURT OF ILLINOIS BECAUSE:

FIRST: THE RESPONDENTS VERY CLEARLY PLEADED THE STATUTORY CONSTRUCTION WHICH THE PETITIONERS NOW ASSAIL AS RENDERING THE STATUTE UNCONSTITUTIONAL, BUT THE PETITIONERS DID NOT EVEN INTIMATE ANY CLAIM THAT SUCH A CONSTRUCTION WOULD RENDER THE ACT UNCONSTITUTIONAL UNTIL AFTER THE SUPREME COURT'S DECISION.

SECOND: EVEN IF, AS THE PETITIONERS CONTEND, THE CONSTITUTIONAL QUESTION HAD BEEN "INTERJECTED INTO THE CASE FOR THE FIRST TIME BY THE OPINION OF THE SUPREME COURT," PETITIONERS WOULD HAVE HAD AN OPPORTUNITY TO RAISE THE CONSTITUTIONAL QUESTIONS BY A PROPER PETITION FOR REHEARING, PREPARED IN COMPLIANCE WITH THE APPLICABLE RULES OF COURT. THEY FORFEITED THIS OPPORTUNITY BY FILING A PETITION WHICH DID NOT COMPLY WITH SUCH RULES AND WHICH WAS THEREFORE STRICKEN.

Under the second Point in this brief, the respondents argue that the supposed federal constitutional questions are not substantial and that, even if they had been properly raised in the state courts, the present petition for *certiorari*

should be denied. However, since a proper assertion of federal questions in state tribunals is prerequisite to access to this court upon those questions, the respondents first submit that no federal question was properly raised in the state courts.

(i)

The respondents very clearly pleaded the statutory construction which the petitioners now assail as rendering the statute unconstitutional, but the petitioners did not even intimate any claim that such a construction would render the act unconstitutional until after the Supreme Court's decision.

It should first be observed that the petitioners make no claim, either by argument or even by assignment of error, that Illinois' procedural law—whether the repository of such procedural law be Illinois' statutes, the rules promulgated by her Supreme Court or her case law—does not afford an adequate opportunity to litigants to elicit decisions upon questions of federal constitutional law. It must therefore be assumed that failure to comply with the adjective law of Illinois is *ipso facto* a failure properly to save federal questions for review by this court.

The Illinois court, whose rules and decisions with respect to what constitutes a proper assertion of a constitutional question are conceded by these respondents to be stricter than the rules prevailing in many other jurisdictions, but which rules are nevertheless not challenged by the present petitioners as denying them due process of law, plainly mark the course of procedure which must be followed in order to evoke a decision by either the trial court or the Supreme Court upon the question whether a statute, if construed adversely to a litigant's contentions, is unconstitutional.

The decisions of the Illinois court require that where one party asserts a construction of an Illinois statute and

where his adversary intends to assert that such construction would render the statute unconstitutional, such claim of unconstitutionality conditional upon such a construction's prevailing must be made **in the pleadings in the trial court**; and that the question will not be deemed to arise after a decision adopting the construction so charged to invalidate the act in question.

The application of this rule is clearly instanced by a contrast of two decisions of the Supreme Court of Illinois pronounced at the same term (the April term, 1934) in one of which cases the constitutional question was held to have been properly raised and in the other of which cases the question was held not to have been properly raised. These two cases are *Meadowmoor Dairies, Inc.* v. *Milk Wagon Drivers,* 371 Ill. 377, and *Economy Dairy Co.* v. *Kerner, Attorney General,* 371 Ill. 261.

In the first of these cases, the plaintiff dairy charged **by its pleadings** that certain provisions of an Illinois statute relating to picketing, if properly construed, did not authorize picketing by a union which was a stranger both to the plaintiff and its employees but further contended that if the statute should be construed as permitting such picketing, it was unconstitutional. The Supreme Court decided the constitutional question.

In the second of the cases cited above, the plaintiff sought to enjoin the enforcement of a statute which, as construed by the Attorney General, forbade the sale of the plaintiff's milk as in violation of the health measure enacted by the statute. The plaintiff merely charged in its complaint that the statute when properly construed did not apply to its dairies. However, on **oral argument in the trial court,** the plaintiff urged that the Attorney General's construction, if that construction prevailed, rendered the act invalid because such a construction would permit the sale of unpasteurized milk if such milk were imported from other states but did not permit the sale of milk produced

in Illinois unless such milk were pasteurized, thereby denying the plaintiff dairy equal protection of the law.

This argument was made only in support of the plaintiff's contention that its construction of the act was the proper one; and the complaint did not charge, as alternative to the plaintiff's contention that the act should be construed as inapplicable to its dairy, that, if construed as applicable to the dairy, it was unconstitutional.

In the Supreme Court of Illinois, the plaintiff argued that the trial court's construction of the statute, if correct, rendered the act void. This question, however, was not raised by the pleadings.

The Supreme Court of Illinois held that no question of the constitutionality of the act was properly raised in the trial court and it transferred the cause to the Appellate Court, it being the practice in Illinois to transfer cases in which appellate jurisdiction is based upon the constitutional question which was not properly raised below.

In the instant case the respondents very clearly pleaded that under the applicable statutes, the Normal School Board had no authority to employ any teacher for longer than one year. (R. 44.) Petitioners have not incorporated respondent's briefs in the Supreme Court in the record but it appears from the Supreme Court's opinion that this question was argued by respondents (there appellants).

Thus petitioners were apprised, both in the trial court and in the Supreme Court, that the respondents contended that under a proper construction of the applicable Illinois statutes, the faculty of the Normal School was, in contemplation of the Illinois law, utterly impotent to make a contract or engagement employing a teacher for a period of more than one school year. Respondents under this point do not argue the substantive merit of this contention. Here allusion is made to the following cases only to show that the question of statutory construction was very plainly

raised by the respondents in the courts of Illinois because it was upon these cases that respondents relied and it was these cases which were cited by the Supreme Court of Illinois in its opinion:

Stevenson v. *School Directors*, 87 Ill. 255.
Davis v. *School Directors*, 92 Ill. 293.
People v. *City of Chicago*, 278 Ill. 318.

Confronted with the contention that the statutes in question, when properly construed, conferred no authority upon anyone to bind the State by a "permanent tenure contract," petitioners were required to assert that such a construction of the statute would deprive them of constitutional rights. (*Economy Dairy Co.* v. *Kerner, Attorney General*, 371 Ill. 261, cited and considered above.)

Petitioners, although aware of respondents' contention at all times, did not seek to encounter that contention upon any constitutional grounds until after the Supreme Court had decided the case, when, for the first time, petitioners urged their present contention in a paper which they denominated a petition for rehearing but which the Supreme Court refused to recognize as complying with its rules governing such petitions.

Even if the petition for rehearing had not otherwise offended the rules, it is clear that, under the cases above cited, Illinois practice did not permit the petitioners to litigate only a question of statutory construction in the trial court and in the Supreme Court and after the Supreme Court had decided this question of statutory construction raise for the first time a question of constitutional right on petition for rehearing.

Therefore the respondents submit that the petitioners did not properly raise the constitutional questions in the state court.

* * * * *

(ii)

Even if, as the petitioners contend, the constitutional question was "interjected into the case for the first time by the opinion of the Supreme Court," petitioners had an opportunity to raise the constitutional questions by a proper petition for rehearing, prepared in compliance with the applicable rules of court. They forfeited this opportunity by the filing of a petition which did not comply with the rules.

Even if we accept the petitioners' contention that they had a right to raise the constitutional questions for the first time on petition for rehearing, it is clear that it was incumbent upon them to comply with the rules of the Supreme Court of Illinois (unless those rules were themselves unconstitutional). Having failed either to comply with those rules or to challenge the constitutionality of the rules themselves, they have no right to impose upon this court the consideration of a question which the Supreme Court, under rules promulgated by that court and binding upon the petitioners, was not bound to consider.

As petitioners point out in this court, the Supreme Court of Illinois did not state the respects in which the petition failed to comply with the rules. However, a mere examination of the petition (R. 151-187) and of the applicable rule clearly demonstrates that the petition was in flagrant violation of the rule.

Rule 44 of the Supreme Court (370 Ill. 49) contains the following provision:

> "The petition shall state **briefly** the points supposed to have been overlooked or misapprehended by the court, with proper reference to the particular portion of the original abstract and brief relied upon, and with authorities and suggestions, concisely stated, in support of the points. **Arguments in support of the petition will not be permitted. Any petition violating this rule will be stricken.**"

Even a cursory glance through the pages of the petition for rehearing shows that it was written in utter disregard of the language emphasized above. The petition is thirty-seven pages in length, longer than petitioners' entire petition, statement and brief in this court. (R. 151-187.)

Pages 1 to 3 are devoted to a declamation upon the evil consequences which must result from the decision. The tenor of the petitioner's rhetoric throughout the entire petition is inflammatory. Upon pages 36 and 37, one reads that petitioners

> "venture to predict that this opinion must have already produced some consternation among the faculties of all the Teachers Colleges,"

that

> "the decision and opinion in this case comes as a surprise not only to these three teachers but also to the defendant's Teacher College Board itself,"

and further descantations upon the philosophy of education with respect to permanent tenor. The petition closes with a quotation from the homilitics of Bacon to the effect that

> "patience and gravity of bearing is an essential part of justice"

and recites Bacon's further admonition that it is the duty of the courts

> "to interpret the law and not to make it."

The petition clearly violated that part of the rule which provided that such petition should not be argumentative. The Supreme Court of Illinois could not have entertained the petition without setting at naught its own rule—a rule which had for its object not only decorum in presentation but brevity essential for the dispatch of the court's business.

Therefore the petitioner's petition for rehearing was tantamount to no petition at all; and the petitioners are not at liberty to speculate—or to ask this court to specu-

late—as to what the decision of the Supreme Court of Illinois would have been had that court felt that it could consider their petition without making a travesty of its own rules.

For the foregoing reasons the respondents submit the question of the constituionality was never properly raised in the Courts of Illinois and that even, if such question was substantial, the present petition for *certiorari* should be denied.

II.

THE FEDERAL CONSTITUTIONAL QUESTIONS ASSERTED IN THIS PETITION, EVEN IF THEY HAD PROPERLY BEEN RAISED IN THE COURTS OF ILLINOIS, ARE NOT SUBSTANTIAL.

The petitioner's brief in this court intimates that there have existed either statutory or judicial rights of permanent tenure with respect to teachers' employment generally or with respect to such employment at Illinois' Normal Schools in particular. The petitioners do not cite any statute or decision creating, confirming or recognizing any such right because no such statute or decision exists.

At pages 25 and 26 of petitioner's brief they cite Section 12 of the Normal School act. That statute, at least at the time that it was enacted, did indeed provide that trustees might remove instructors

> "after having given ten days' notice of any charge which may be duly presented and reasonable opportunity for defense."

But it was never contended or even intimated prior to the present case that this statute had any application except to the removal of instructors **during the period for which they were employed**; and this section had never been interpreted as rendering contracts of employment indefinite or permanent as to period.

It has been an inveterate principle of the law of Illinois, recognized consistently by the Supreme Court of Illinois since the early days of that court's history, that in the absence of express statutory authority, contracts employing teachers for periods longer than the school year have are absolutely void as to the period in excess of the school year.

Respondents recognize that the wisdom of the policy embodied in this rule is one which may be highly debatable in the mind of an educational economist and that statutes of other states have enacted a contrary policy. On the one hand, advocates of permanent tenure argue the enhanced stability and individual security of a school system which assures its teachers permanent tenure. On the other hand, foes of the plan point to the evils of academic mortmain where teachers can be selected by a board whose action must bind its successors for forty years.

But however debatable the question of policy may be, the Supreme Court of Illinois has steadfastly adhered to the rule that no temporarily incumbent school administration may bind its successors by contracts visiting such successors with liability upon permanent or indefinitely long term contracts of employment.

An early case recognizing this rule is that of *Stevenson v. School Directors,* 87 Ill. 255. In that case, a public school board had power to

> "appoint all teachers, fix the amount of their salaries, etc."

The statute was silent as to whether such contracts of employment might or might not contemplate a period of tenure longer than the current school year. It was held that, if local school boards were at liberty to contract for periods longer than one year, the persons incumbent as members of the board at any time might fetter their suc-

cessors in the selection of teachers. The court said, pages 257 and 258:

> "If the contract here sought to be enforced were to be held valid, it would necessarily be because the board of directors are unlimited in respect of contracting for future services of teachers. If they may contract for services to be commenced four months in advance, and after the board as organized shall cease to exist, why may they not do so indefinitely? If they are not, in this respect, limited by the current school year, where is the limit?"

In the case of *Davis* v. *School Directors,* 92 Ill. 293, it was likewise held that a contract to employ a teacher for a period extending beyond the school year was void, the reason being that to sustain such contracts would be to allow one administration of a school to visit upon succeeding administration *personnel* whom the successors have not selected.

This rule was affirmed in *People* v. *City of Chicago,* 278 Ill. 318. This case involved a claim that the code governing Chicago's schools empowered the school board to enter into permanent tenure contracts. Notwithstanding the broad and comprehensive administrative powers conferred on the Chicago school board by the code, the court held that the absence of an express provision authorizing the board to contract for teachers, employment beyond the school year was fatal to such a contract.

It should be particularly noted that the rule that a board may not employ a teacher for more than one year is not based upon any express provision in any statute. On the contrary, the rule is based upon the **absence** of any provision expressly authorizing one administration so to entail the tenure of teachers as to prevent succeeding administrations from replacing them with other teachers.

The excerpt hereafter quoted makes it very plain that the board may refuse to renew a contract, even though its

reasons for doing so are arbitrary or even capricious. It should also be observed that the court expressly held that no expectancy or right under any pension plan abrogated or modified this rule. The court said at pages 325 and 326:

> "By the statute the board of education in cities having a population of 100,000 or more is given complete control of the schools of the city. Among its powers is that of employing teachers and fixing the amount of their compensation. It is empowered to enact such ordinances as may be deemed necessary and expedient for the proper management of the schools. The board consists of twenty-one members, appointed by the mayor of the city. The tenure of office is three years, the terms of office of seven of the members expiring each year. A new board is thus brought into existence each year. **The board has no power to make contracts for the employment of teachers to extend beyond the ensuing school year.** (*Stevenson* v. *School Directors*, 87 Ill. 255; *Davis* v. *School Directors*, 92 id. 293.) **A new contract must be made each year with such teachers as it desires to retain in its employ. No person has a right to demand that he or she shall be employed as a teacher. The board has the absolute right to decline to employ or re-employ any applicant for any reason whatever or for no reason at all.** The board is responsible for its action only to the people of the city, from whom, through the mayor, the members have received their appointments. It is no infringement upon the constitutional rights of anyone for the board to decline to employ him as a teacher in the schools, and it is immaterial whether the reason for the refusal to employ him is because the applicant is married or unmarried, is of fair complexion or dark, is or is not a member of a trades union, or whether no reason is given for such refusal. The board is not bound to give any reason for its action. It is free to contract with whomsoever it chooses. Neither the constitution nor the statute places any restriction upon this right of the board to contract, and no one has any grievance which

the courts will recognize simply because the board of education refuses to contract with him or her. Questions of policy are solely for determination of the board, and when they have once been determined by it the courts will not inquire into their propriety.

The existence of a teachers' pension funds in the city of Chicago does not restrict the board of education in its right to select such persons as teachers as it may desire to employ, nor does it confer upon one who has been a contributor to such fund any right to demand that he or she be re-employed. The only right upon which a contributor to the fund can insist in case the board concludes that it will not re-employ him or her, is the right to receive at once the money he or she may have contributed to the funds. (Smith-Hurd's Stats. 1916, chap. 122, sec. 161.)"

We repeat that in the case above cited, there was **no statute** that limited the period for which a teacher might be employed. On the contrary, the decision was based upon the same general considerations which had dictated a like decision in the earlier cases.

The respondents therefore submit that the contracts of employment necessarily terminated at the end of the school year; and that the petitioners were never in fact dismissed or discharged, but on the contrary, their employment ceased because new contracts were never made.

In any event, the question was one of state law; and the ruling of Illinois' court of last resort is conclusive here.

* * * * *

The respondents contended in the state courts that the provisions of Section 12 of the Normal School act (Ill. Rev. Stats. 1939, Ch. 122, Par. 462), relied upon by the petitioners, had been repealed by a general statutory revision of the administration of the normal school system before any of petitioners were employed. (Ill. Rev. Stats. 1939, Ch. 127, Par. 59.) The Supreme Court of Illinois did not decide this question because that court held that in any event, the provisions of Section 12 with respect to the right of

teachers to a hearing before dismissal applied only to teachers dismissed during the term for which such teachers were employed; further held that such period could not exceed the school year; and therefore held that the statutory provision for a hearing before dismissal, even if that provision were not repealed, **did not entitle teachers to a statutory hearing after the petitioners' employment had ceased and before such teachers were reemployed by a new contract for the next year.**

As the cases above cited illustrate, this decision imported no new principle into the law of Illinois. In the case of *People* v. *City of Chicago,* 278 Ill. 318, already cited and considered, the court had applied the rule that contracts employing teachers may not exceed the school year to the school system of the City of Chicago, notwithstanding the comprehensive language of the act governing Chicago School system, which language is considered in that case.

Very clearly this question was purely and entirely one of the construction of a state statute. Of course, the decision of the Supreme Court of Illinois upon that question is conclusive here.

Petitioners rely heavily upon the case of *Sloan* v. *School Directors,* 373 Ill. 511, contending that this case established a doctrine which the present case unconstitutionally repudiates. The truth is that that case strongly supports the respondents. In that case **the statute expressly authorized permanent tenure contracts.** The court, although upholding the contracts in that case solely because the applicable statute authorized such contracts, nevertheless again declared that **in the absence of such a statute, the contract would be void.** The court said:

> "In support of their contention that a Board of School Directors cannot employ a teacher for more than one year, appellees cite *Stevenson* v. *School Directors,* 92 Ill. 293. Those cases do so hold, but **they have no application here** for they were decided

before the enactment of Sec. 127a *supra*, Laws of Illinois, 1927, p. 823."

The statute cited in the excerpt above quoted does not apply to normal schools and petitioners do not contend that it does.

Thus it appears that in the present case the only question decided by the Supreme Court was that of whether, under Illinois law, the normal school had power to conclude a contract of permanent or indefinite employment with the petitioners. The Supreme Court, following an unbroken line of decisions, held that it had no such power. Therefore, the Supreme Court held, **not** that the petitioners were lawfully discharged, but that their contracts of employment expired and that they had no right to compel the respondents to make an entirely new contract with them.

The pension act relied upon by the petitioners in support of their claim of vested rights did not go into effect until after their employment had terminated. (See *Petitioners' Brief*, pages 21 and 22, where this is admitted.)

Petitioners' claim of right to a hearing is based entirely upon statutes which, as petitioners themselves admit, did not by their terms apply to the normal schools at the time of the termination of petitioners' employment. In the absence of statute, there is no federal constitutional right to a hearing before dismissal where the discharged person is a state employee. *Wilson* v. *North Carolina*, 169 U. S. 586.

A fortiori there is no federal constitutional right to a hearing by a teacher whose contract of employment has expired.

THE BRAND CASE DISTINGUISHED.

Petitioners rely upon this court's decision in the case of *Indiana* v. *Brand*, 303 U. S. 95. That case is so clearly distinguishable as not to be pertinent to the case at bar. In the *Brand* case the Indiana statute expressly provided:

> "That any person who has served or who shall serve under contract as a teacher in any school corporation * * * for five or more successive years, and who shall hereafter enter into a teacher's contract for further service with such corporation, shall thereupon become a permanent teacher of such school corporation."

Thus the Indiana legislature had positively enacted a statute that any teacher who had served for five or more successive years and who shall thereafter enter into a contract to teach a further period should become a permanent teacher.

The contract of employment expressly incorporated the provisions of its statute into its text. Obviously this court had no choice in declaring that a construction by the state court which nullified both the statutory provision and the contractual adoption of the statutory provision offended the First Amendment.

The difference between the Indiana case and the present Illinois case is simply this: In Indiana, a statute provided that the appellant should be a "permanent teacher." A contract expressly recognized the teachers' permanent *status*. In the present case, the Illinois Supreme Court has consistently held that contracts employing teachers expire at the end of the school year and that an express provision employing a teacher for longer than that period is absolutely void.

In conclusion: The petitioners complain that the present decision is a shocking repudiation of the law of Illinois. At the same time, they complain that the present decision is reactionary and that it is founded upon decisions that are, in petitioners' own phrase, "hoary with age." Of course a reactionary view, adhering to antiquated precedents, no matter to what other criticism it may be susceptible, is not subject to criticism on the ground that it embodies an unconstitutional revolution on the part of the court and

thereby repudiates antecedently vested rights. It is solely upon the ground of this latter criticism that the petitioners seek access to this court in the instant proceedings.

CONCLUSION.

For the foregoing reasons, the respondents respectfully submit that the present petition for a writ of *certiorari* should be denied.

Respectfully submitted,

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